CF0000064533

XII-188/(Jail)
C.J.P.R.—5,000-9-81

CA 2403/2002 2

APPEAL OF PRISONER

No. 881 Name Bhurwa Lodhi @ Lat Khor

Father's name Sada Ram Lodhi

Residence Contractor Colony Supela. Age 45 yr.

Sentenced to 16 yr. R.I. on 5.4.2000.

Under section 376 IPC by Smt. Shakuntala Das Additional Session judge Durg & Special judge Durg. (M.P.)

it is explained to the prisoner that if he states or wishes to be represented by a legal practitioner the Appelate Court will not proceed with the base for seven days unless the legal practitioner appears. If the legal practitioner does not appear with in seven days he may not be heard at all If the prisoner states that he does not wish to be represented by legal practitioner the court may proceed at once with the case and will not be obliged to give a hearing to any legal practitioner who should appear.

1 Date of Application for copy of Judgement

2 Date of which copy received 5/4/2000.

3 Date on which Appeal sent

4 Whether the prisoner wishes to be represented or not – Yes/No.

No. 881 Name [redacted]

Continued in District Jail Durg

No. 795/ATE dated 13/4/2002 198

Forwarded to the CHIEF JUDICIAL MAGISTRATE Durg

to gather with a copy of judgement or order passed in the case for favour of transmission to the proper Appilliate Court.

Superintendent-Central [redacted]

Date of receipt in C. J. M.'S Office

Date of receipt of record to accompany

Memo of Appeal of the Appellate C

30

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.2403/2000

Single Bench: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Bhurawa Lodhi

Versus

State of Chhattisgarh

Smt. Savita Tiwari, Counsel for the appellant.

Shri Ashish Shukla, Government Advocate/Addl.Public Prosecutor for the State.

JUDGMENT

(Delivered on 28th of March 2006)

This appeal is directed against the judgment dated 5.4.2000 delivered by Smt. Shakuntala Das, Additional Sessions Judge, Durg in Sessions Case No. 263/99 whereby the appellant was convicted under Section 376 I.P.C. and was sentenced to undergo rigorous imprisonment for ten years and a fine of Rs.500/- and in default to undergo additional rigorous imprisonment for three months.

2. Factual matrix in brief is that on 3.5.99 the prosecutrix, aged 12 years was living with her parents as a tenant in the house of the appellant herein situated at Contractor Colony, behind Lal Bahadur Shastri Hospital, Supela, District Durg. At about 2.30 P.M. mother of the prosecutrix was sleeping. Father of the prosecutrix had gone to work. While the prosecutrix went to the room for drinking water, the appellant came there from the adjacent room and forcibly took the prosecutrix to his room and after making her lie on the cot, the appellant herein lifted the *lahanga* of the prosecutrix and committed rape on her. The appellant gagged her mouth when she attempted to

shout. F.I.R. was lodged by the prosecutrix at Police Station Supela on 3.5.99 at 5.15 P.M. narrating that the appellant was forcibly trying to effect penetration but in this effort the semen got ejaculated and her *lahanga* got stained with the semen of the appellant.

3. The prosecutrix was sent for medical examination. Dr. Smt. D. Chakravarthy P.W.7 on 4.5.1999 and did not fine any marks of violence on her person. She opined while testifying before the Court that deep penetration had not taken place. She prepared two vaginal slides and after sealing them, advised chemical examination thereon. The *lahanga* of the prosecutrix was seized vide Ex.P.2. One *Janghiya* was seized from the appellant on 4.5.1999 vide Ex.P.3. On being sent for chemical analysis to the F.S.L. vide report dated 8.7.1999, presence of semen and human spermatozoa was confirmed on the *lahanga* (petticoat), *Janghiya* (underwear) and the vaginal slide. The appellant was medically examined by Dr. I. K. Wadhwani P.W.8 who did not find any injury on the private parts of the appellant. He opined that the appellant was capable of performing sexual intercourse. After completion of investigation, the appellant was prosecuted for offence under Section 376 I.P.C.

4. The appellant abjured the guilt, pleaded false implication due to non-payment of rent by the mother of the prosecutrix and further asserted that he was incapable of performing sexual intercourse. No evidence in defence was adduced. Learned trial Judge relying upon the testimony of the prosecutrix, Asha Bai P.W.2, the mother of the prosecutrix, Niranjan P.W.3, a neighbour and also the report of the F.S.L. dated 8.7.1999 and the medical evidence convicted and sentenced the appellant as aforesaid in para - 1.

5. Smt. Savita Tiwari, learned counsel for the appellant has assailed the conviction of the appellant on the ground that the

absence of any injury on the penis of the appellant and also on the prosecutrix renders her testimony unworthy of credit. Reliance was placed on *Rahim Beg v. The State of U.P.* reported in **A.I.R. 1973 SC 343** wherein it was held that in a case of rape alleged to have been committed by a fully developed man on a girl of 10 or 12 years who was virgin and whose hymen was intact, absence of injury on the male organ of the accused would point to his innocence. Smt. Savita Tiwari, learned counsel for the appellant prayed in the alternative that the appellant was in jail since 5.5.99 and had already undergone incarceration for a period of over six years and ten months. She prayed that in the facts and circumstances of the case, the sentence awarded should be reduced to the period already undergone by the appellant. On the other hand, Shri Ashish Shukla, learned Government Advocate argued in support of the impugned judgment. As regards the prayer for reduction of sentence is concerned, he argued that in view of the commission of rape on a minor girl aged about 12 years, the sentence awarded by the trial Judge is adequate and does not call for any interference.

6. Having heard the rival contentions, I have perused the record of Sessions Case No.263/99. F.I.R. Ex.P.1 lodged by the prosecutrix shows that after making her lie on the cot the appellant was forcibly trying to penetrate his male organ inside her vaginal orifice and in this process ejaculation of semen had taken place which had stained her *lahanga*. She has given a minute description of the manner in which the appellant forcibly took her to his room adjacent to the tenanted premises and after making her lie on the cot, spread her feet and placing himself in between, inserted his male organ inside her vagina and committed rape on her. The testimony of the prosecutrix is fully corroborated by the report of the F.S.L. dated 8.7.99 which shows

that the vaginal slides of the prosecutrix as also her *lahanga* (petticoat) were found to contain semen and human spermatozoa. The testimony of Sub-Inspector Gopinath Sand P.W.6 in para 5 clearly shows that the report of the F.S.L. had been tendered during his evidence by the prosecution. The mere fact that the document has not been exhibited would be of no avail to the appellant. The testimony of Asha Bai P.W.2 fully corroborates the version of the prosecutrix regarding the rape committed upon her by the appellant. I have minutely perused the testimony of the prosecutrix. She has stood the test of cross-examination and her testimony is wholly reliable and worthy of credit. Medical evidence of Dr. Smt. D. Chakravarty P.W.7 also shows the possibility of penetration of the male organ, though not completely in the vaginal orifice. This also finds corroboration from F.I.R Ex.P.1. The evidence of Jaswanta Bai P.W.4 and Asha Bai P.W.2 also shows that both feet of the wife of the appellant are crippled and she earns her livelihood by begging. It appears that it was on this count that the appellant strongly felt a surge of lust and committed rape on a hapless minor girl aged 12 years who was living in his house as a tenant.

7. For constituting the offence under Section 376 I.P.C. mere penetration within the vulva or vagina is sufficient. Deep penetration of the male organ is not necessary for constituting the offence of rape. Considering the medical evidence of Dr. Smt. D.Chakravarty and also the facts mentioned by the prosecutrix in the F.I.R., it appears that complete penetration had not taken place and the appellant had ejaculated soon after his male organ was introduced in the vaginal orifice of the prosecutrix. In the facts and circumstances, it was therefore, not necessary that the appellant would have sustained any injury on his male organ. Due to these reasons, case of Rahim Beg

(supra) cited by learned counsel for the appellant is of no avail to the appellant.

8. The defence that the appellant was wholly incapable of performing sexual intercourse is rendered false by the testimony of Dr. Wadhwani P.W.8 who found that the appellant was capable of performing sexual intercourse. The defence that the prosecutrix had falsely implicated the appellant due to non-payment of rent is not even plausible. The testimony of the prosecutrix, aged about 12 years, is wholly reliable, inspires confidence and in view of the corroboration from Asha Bai P.W.2 and the medical evidence of Dr. Mrs. Chakravarty P.W.7 rightly formed the basis for the conviction of the appellant under Section 376 I.P.C. So far as the sentence awarded by the learned trial Judge is concerned, considering the manner of rape on a hapless girl aged 12 years by the appellant, the mere fact that the appellant has undergone incarceration for a period over six years and ten months would not in any manner entitle the appellant to any leniency in the sentence. In a tradition bound and conservative society, the shame of sexual assault on a girl aged 12 years cannot be lost sight of. The Courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women, particularly of tender age and children. For such heinous offences, such a sentence has to be awarded which would discourage wolves in the society who are on the prowl for easy prey, more so when the victim of crime is a minor child.

9. Having thus considered the rival contentions and the evidence led by the prosecution, I am of the considered opinion that the conviction of the appellant under Section 376 I.P.C. and the sentence

awarded thereunder by the trial Judge are well founded and call for no interference.

10. In the result this appeal being devoid of merit is dismissed.

Sd/-
Dilip Raosaheb Deshmukh
Judge